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88-390

No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

LARRY PETERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals applied the correct standard in reviewing the District Court determination that the prosecutor could impeach its own witness.

II. Whether the district court relied on competent evidence in making its finding that the prosecution could impeach the testimony of a co-defendant witness which it called with evidence of his prior conviction in that case.

III. Whether the district court gave counsel for defendant-petitioner sufficient opportunity to make a record for the motion for mistrial.

PARTYS TO THE PROCEEDINGS

The names of all parties are listed completely in the caption.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals in United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988), and is printed in Appendix A hereto, infra page 16.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on March 10, 1988. A timely petition for rehearing was denied on June 7, 1988.

STATUTES INVOLVED

Rule 603 of the Federal Rules of Evidence states:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in the force calculated to awaken the witnesses conscience and impress the witnesses mind with the duty to do so.

Rule 607 of the Federal Rules of Evidence states:

> The credibility of a witness may be attacked by any party, including the party calling him.

STATEMENT OF CASE

Defendant-Petitioner Larry Peterman was convicted in the district court of wire fraud and conspiracy to commit wire fraud. Peterman was a founder of "Meat Masters", a retail meat outlet that sold large quantities of meat to the public. The stores advertised their prices on television, and prospective customers were given a toll-free number to obtain appointments to purchase meat.

Peterman and other employees of Meat Masters were indicted for consumer fraud for the sale of meat in Wyoming. Nine defendants were charged with fraudulent sales and advertising practices in violation of the wire fraud provisions of 18 U.S.C. §1343. Four Defendants were convicted, including Peterman, in 1981. The Tenth Circuit Court of Appeals reversed Peterman's conviction because of a failure by the district court to give a good faith jury instruction. United States v. Hopkins, 744 F.2d 716 (10th Cir.

1984) (en banc). The matter was tried again and Peterman was convicted again in 1985. He was sentenced to three years in prison.

At the second trial, the prosecution called Mr. Mark Lundquist, a co-defendant of Petitioner Peterman in the first trial, who was convicted but did not appeal. During the first trial, Lundquist denied any illegal activities in his conduct with respect to the business.

After being called by the government at the second trial, Lundquist testified favorably to the Defendant-Petitioner and in complete accord with his previous testimony. The prosecutor thereafter sought to impeach Lundquist's testimony through evidence of Lundquist's prior conviction of the very charges Petitioner faced. The district court allowed the impeachment evidence over Defendant-Petitioner's objection.

The Tenth Circuit, in its opinion, held that evidence of the conviction was

admissible and properly supported by the factual findings of the district court and the record below. U.S. v. Peterman, No. 85-1993, slip op. (10th Cir., March 10, 1988).

ARGUMENT

The issues involved in this case present procedural departures by the federal courts of such magnitude that they call for the exercise of this Court's supervisory powers. Furthermore, the issues of this case raise important issues of federal law dealing with competence of witnesses.

The prosecution in this case called Mr. Lundquist with the purpose of impeaching him with evidence of his prior conviction.

Under Common Law, one could not impeach a witness that he called. This procedure was found violative of the confrontation clause of the constitution by this Court. Chambers v. Mississippi, 410 U.S. 284 (1973). The Chambers court thinking is reflected in the

Federal Rules of Evidence. F.R.E. 607.

The Tenth Circuit in its decision below recognized that although the Rules of Evidence allow either party to impeach a witness, even one they called, it would be an abuse of that rule to call a witness in order to place before the jury substantive evidence which is not otherwise admissible. U.S. v. Peterman, supra at 9.

All of the circuits seem to agree with the principle that this rule of evidence should not be allowed to open the door for the improper introduction of evidence not otherwise admissible. The approach to be taken and standard to be applied when such a claim has been raised, however, is not clear.

The Tenth Circuit held in the instant case that the standard to be applied was to judge the motivation of the prosecutor in calling the witness and determine whether he had reason to believe the witness may testify differently. U.S. v. Peterman, supra at 10.

In so doing the Court set the motivation standard as being the prosecutor's "primary" purpose for calling the witness. While it may be rational to evaluate the conduct based on the "good faith" actions of the prosecutor below. The "primary purpose" standard would allow purposeful violation of the principle. In otherwords, the standard allowed by the court would allow an improper motivation so long as the conduct can be couched in some articulable believe that he may receive some favorable testimony. Such a standard encourages the calling of a co-defendant if there is any hope of receiving favorable testimony because the failure to receive such may be an even greater benefit. If a previously sworn witness is expected to recant that sworn testimony without immunity or having ever made a clear statement to the contrary, it is hard to visualize when such a tactic may not be used.

The next difficulty is the type of

evidence which should be utilized in such an evaluation of such a dispute once raised. In spite of the efforts of counsel for defendant-petitioner to explore the issue and create a record, the trial court was allowed to make its determination based upon evidence which is not competent. The evidence relied upon by the Tenth Circuit was as follows:

1. The Affidavit from Mr. Lundquist asserting that the government knew Lundquist intended to maintain his innocence just as he had testified in the 1981 trial.

2. The explanations proffered by the prosecutor as to why it expected Mr. Lundquist to testify differently.

3. The Order of the Trial Court finding that, based on the Court's determination of the credibility of the "witnesses" and their "testimony", the Court was persuaded by the statements of th prosecutor, Mr. Pico and his "witness", Mr. Ackerman.

4. The Trial Court's finding that one

of the defense counsel had met with Mr. Lundquist the night before the government called him as a witness and therefore had somehow influenced his testimony.

This evidence is clearly not competent based upon established evidentiary procedures. The record reflects that the defendant filed an affidavit of Mr. Lundquist, but that the prosecution filed no affidavits contradicting the statements of Mr. Lundquist's affidavit. Instead, in an argument outside the presence of the jury, the Judge allowed the government's attorney to proffer his and Mr. Ackerman's testimony and accepted that in lieu of sworn testimony or even an affidavit. The trial Judge relied on Mr. Pico's representations as to his meeting Mr. Lundquist during which Mr. Ackerman was present. Neither Mr. Pico nor Mr. Ackerman were sworn or gave any "testimony", nor did they submit affidavits in support of their position.

In United States v. Fiore, 443 F.2d 112 (2nd Cir. 1971), cert. denied, 410 U.S. 984 (1973), the Court of Appeals for the Second Circuit affirmed the requirement that an oath must be administered for evidence to be received in court and testimony to be considered competent. The Fiore Court ruled:

> Although F.R.Cr.P. 26 does not expressly require an oath, it refers the admissibility of evidence in the competency of witnesses to the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. There is no room for doubt what these principles require in this context. Wigmore instructs that for all testimonial statements made in Court the oath is a requisite, 6 Evidence, Section 1824 (3d ed. 1940)(Emphasis in original). Id. at 115.

The Trial Court should not have relied on statements which were not competent and admissible evidence under the Federal Rules of Evidence and Federal Rules of Criminal Procedure.

The final question this case presents is whether the Trial Court allowed sufficient opportunity to defense counsel to make a record on the motion for mistrial following the impeachment testimony. The record reflects that the Judge limited the evidence and the defendant-petitioner's opportunity to respond to allegations made against his counsel. The Trial Court did not allow defendant-petitioner's attorney to put on testimony in regard to the motion for mistrial. Rather, the Court limited the request to affidavits in lieu of actual testimony.

In the Trial Court's allegation that counsel for defendant-petitioner had influenced Mr. Lundquist, the Court first of all based its finding on the mere fact that an interview had occurred between the witness and counsel. Then the court precluded counsel from making a record of his position by cutting him off and having the jury return

before counsel could finish. In not giving defendant-petitioner the opportunity to explore the basis for the Judge's opinion, defendant-petitioner was denied an adequate opportunity to ensure the record at trial contained sufficient competent evidence to support his motion for mistrial.

In United States v. Gorney, 732 F.2d 597 (7th Cir. 1984) the Seventh Circuit emphasized that it is important to examine the prosecutor's conduct in these issues with careful scrutiny. In examining whether impeachment of a witness by admitting his prior conviction is proper, that Court ruled:

> Under Rule 607 of the Federal Rules of Evidence, the credibility of a witness can be attacked by any party, including the party calling the witness. It so possible for a party to abuse this rule, and prosecutorial conduct, in particular, must be carefully scrutinized to ascertain that a witness has not been called merely for the purpose of introducing irrelevant evidence or of establishing the defendant's guilt by association with the witness. The rule which no longer required a

> party to vouch for the veracity of its witnesses could be misused as a vehicle for the introduction of this sort of improper evidence.
>
> . . .These circumstances present a situation which must be subjected to careful judicial scrutiny to avoid possible misconduct or abuse. Id. at 604.

Petitioner submits that the trial Judge did not carefully scrutinize the circumstances under which Mr. Lundquist was called as a government witness; improperly allowed the testimony to stand on incompetent evidence; and applied a standard for review which provides to great a latitude for abuse. Petitioner invokes this Court's supervisory powers to cause the Tenth Circuit to consider only competent evidence in this regard, and to give petitioner a fair opportunity to apprise the Court of the circumstances surrounding the case with competent evidence.

RESPECTFULLY SUBMITTED this 4th day of August, 1988.

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UNITED STATES OF AMERICA,
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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 85-1993
v.	)	(Filed Mar. 10, 1988)
LARRY PETERMAN, Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Wyoming
(D.C. CR 81-036)

Jerome H. Mooney, of Mooney & Smith, of Salt Lake City, Utah, for Defendant-Appellant.

Francis Leland Pico, Assistant United States Attorney (Richard A. Stacy, United States Attorney and Lisa E. Leschuck, Assistant United States Attorney, with him on the brief), Cheyenne, Wyoming, for Plaintiff-Appellee.

Before SEYMOUR, REINHARDT,* and TACHA, Circuit Judges.

TACHA, Circuit Judge.

Larry Peterman appeals from his conviction for wire fraud and conspiracy to commit wire fraud. He also

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* The Honorable Stephen R. Reinhardt, United States Court of Appeals for the Ninth Circuit, sitting by designation.

appeals from the enhancement of his sentence by the district. court. We affirm the conviction, but because of the lack of findings, we remand for resentencing.

Peterman was the founder of "Meat Masters," a chain of stores that sold sides of beef and other large quantities of meat to the public. Meat Masters stores were located in Utah and Wyoming. The stores advertised their products on Salt Lake City and Cheyenne television stations and in print media throughout the area. Consumers were instructed to call a toll-free telephone number to arrange appointments for the purchase of meat. Over 400 consumers bought meat from Meat Masters through its stores in Casper, Cheyenne, and Eden, Wyoming.

Peterman and other Meat Masters employees were indicted for consumer fraud arising from the sale of meat in the stores in Wyoming. The nine defendants were charged with various fraudulent practices in the advertising and sale of meat in violation of the wire fraud provisions of 18 U.S.C. § 1343. Peterman and three other defendants were convicted in a trial in 1981. This court reversed Peterman's conviction because of the district court's failure to give a good faith instruction to the jury. *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc).[1] Peterman was again convicted in 1985 and sentenced to three years in prison.

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[1] In another case this court affirmed the order of the Secretary of Agriculture finding Peterman guilty of deceptive trade practices and imposing a $20,000 penalty. *Peterman v. United States Dept. of Agriculture*, 770 F.2d 888 (10th Cir. 1985).

Peterman brings four allegations on appeal: (1) the district court's instructions to the jury expanded the scope of the indictment, (2) the court erred in allowing the government to introduce evidence of the 1981 conviction of one of Peterman's original codefendants, (3) the court erred in allowing the prosecution to read parts of Peterman's testimony from the 1981 trial into the record, and (4) the court improperly enhanced the sentence.

I.

Peterman alleges that the district court's instructions to the jury improperly expanded the scope of the indictment. In particular, Peterman contends that the court's definition of "bait and switch" tactics allowed the jury to reach a guilty verdict on the basis of a theory not relied upon by the grand jury in delivering the indictment.

Jury instructions may not include an element of an offense if that element was not charged in the indictment. *United States v. Sloan*, 811 F.2d 1359, 1363 (10th Cir. 1987). The court in *United States v. Lemire*, 720 F.2d 1327, 1344 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984), noted two dangers that arise from a substantial deviation of instructions from an indictment. First, a defendant is required to answer to a charge that was not brought by a Grand Jury, thus violating the express language of the fifth amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Second, a defendant is denied sufficient notice to present and prepare an adequate defense to the crime charged. Nevertheless, instructions necessarily deviate somewhat from an indictment because instructions explain to a jury how

the law relates to the facts presented at trial. Therefore, instructions will be found invalid only if their deviation from the indictment infringes on a defendant's rights. Lemire, 720 F.2d at 1344; *see also* Sloan, 811 F.2d at 1362-63.[2]

Count one of the indictment charged Peterman with "using deceptive sales techniques and making false representations to victim-consumers." The indictment alleged that "different consumer-victims.were deceived in varying ways," including "the use of 'bait and switch' tactics, in which the Defendants persuaded consumers to purchase more expensive cuts of meat than those advertised, by making the advertised cuts either unavailable or so unattractive in appearance that no reasonable consumer would purchase them." The indictment then recited several overt acts that Peterman had allegedly committed, such as "provid[ing] certain advertised items of bonus meats which were green and moldy," failure to provide consumers with promised bonus meat, selling "a quantity of spoiled pork that was part of the bonus package," and selling meat to one customer with "an

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[2] We held the variance between the indictment and the instructions in Sloan to be prejudicial. The indictment alleged that the defendant "unlawfully seized, abducted, confined and kidnapped" his victim. 811 F.2d at 1361. As we noted on review, "the court instructed the jury that '[w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, or carries away . . . any person' is guilty of violating 18 U.S.C. § 1201." Id. at 1363 (emphasis original). The addition of the terms "inveigles" and "decoys" was prejudicial in Sloan because "the testimony of the victim was equivocal regarding the use of force." Id.

estimated cutting loss of 47%, and . . . overcharg[ing him] an additional 20¢ per pound, for 'custom cutting', contrary to the representations of the Defendants." The indictment identified twenty-one specific instances in which the defendant had sold or participated in the sale of meat in furtherance of the charged offense.

The court instructed the jury as follows:

> Count 1 of the indictment charges as a part of the conspiracy to defraud, that bait and switch tactics were used by the defendant in the operation of various Meat Masters stores.
>
> Under Wyoming law, a person engages unlawfully in a deceptive trade practice when he knowingly in the course of his business and in connection with a consumer transaction engages in bait and switch advertising.
>
> Bait and switch advertising consists of an offer to sell merchandise, which the seller doesn't intend to sell, which advertising is accompanied by one or more of the following practices:
>
> A. Refusal to show the merchandise advertised; or
>
> B. False disparagement in any material respect to the advertised merchandise or the terms of sale; or
>
> C. Requiring undisclosed tie-in sales, or other undisclosed conditions to be met prior to selling the advertised merchandise; or
>
> D. Knowingly showing or demonstrating defective merchandise, which is unusable or impractical for the purpose set forth in the advertisement; or
>
> E. Accepting a deposit for the merchandise and subsequently charging the buyer for a higher priced beef item without his consent, or

F. Willful failure to make either deliveries of the merchandise or to make a refund therefor.

Even assuming that part of the definition of bait and switch in the jury instructions diverged from the activities alleged in the indictment, no evidence was offered at trial to prove the offenses described in the objectionable parts of the indictment. Instead, the evidence produced at trial was consistent with the activities the government alleged in the indictment.

Fourteen consumers who had purchased meat from Meat Masters testified against Peterman at trial. Their testimony was strikingly consistent. They described a pattern of sales tactics that shows that this was perhaps the classic "bait and switch" case.

A prospective consumer learned of Meat Masters through advertisements for meat priced at 97¢, 99¢, $1.04, $1.09, or $1.29 per pound. The consumer then called Meat Masters on its toll free telephone number to arrange an appointment at one of its stores. Upon arrival at the store, the consumer would be asked if he or she had ever purchased meat in bulk quantities before. Most consumers answered "no." The sales representative would then show the consumer the meat. First, the consumer would see the meat available at the sale price. It was variously described as "kind of gray and brown and kind of had a green tinge to it," "pretty dried out," "pretty fatty," "really dark," "terrible" and "kind of grayish color," having "tendons coming . . . through it," and "really gross." The sales representative would then show the consumer another cut of beef which looked "real nice," "really attractive," "fresher," "a lot better," "real appealing," or "a hundred percent better." This meat,

however, was priced at $2.39,$2.45, $2.49, $2.67, or $2.87, per pound. The representative would then attempt to convince the consumer that the more expensive meat afforded a better buy because there was less waste than the sale meat. The consumer would agree to purchase the more expensive meat.

In a few instances there were variations from the general pattern. In one instance, the representative told the consumer that he could not sell the sale meat, despite the consumer's desire to purchase it, because it must be kept available for other consumers who might wish to purchase it. Several consumers also complained that the advertised bonus items – such as chickens, ham, bacon, or pork chops that were promised free for the purchase of meat were unavailable.

Thus, the evidence produced at trial closely corresponds to the offense initially described in the indictment. There is no evidence in the record which would have allowed the jury to convict Peterman of an offense that was not charged in the indictment. We therefore hold that the district court's instructions to the jury did not constitute prejudical error.

II.

Peterman raises several challenges to the admissibility of evidence that Mark Lundquist, who had managed Meat Masters stores in Eden and in Casper, was convicted in the first trial in this matter. Lundquist was a codefendant of Peterman in the 1981 trial, during which Lundquist denied his involvement in the illegal activities alleged in the indictment. Lundquist was convicted and did not appeal. The government called Lundquist as a

witness against Peterman in this trial. When Lundquist began to testify favorably to Peterman, the prosecutor sought to impeach Lundquist through evidence of his prior conviction. The district court allowed the impeachment over Peterman's objection.

A.

The admissibility of testimony regarding the conviction of a codefendant depends on the purpose for which such evidence is offered. The government may not introduce evidence of a codefendant's conviction as substantive evidence of the guilt of the defendant who is on trial. *United States v. Davis*, 766 F.2d 1452, 1456 (10th Cir.), *cert. denied*, 474 U.S. 908 (1985); *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983). If the codefendant testifies, however, evidence of a prior conviction is admissible to impeach the credibility of the witness. *Davis*, 766 F.2d at 1456; *Baez*, 703 F.2d at 455. Moreover, pursuant to Fed. R. Evid. 607, the government is allowed to impeach the testimony of a codefendant even though the government itself called the codefendant as a witness.

Evidence of the conviction of a codefendant, then, may be used for impeachment but may not be used to establish the guilt of the defendant. The possibility of an effort to offer evidence of a conviction ostensibly for impeachment but with the true intent of admitting substantive evidence of guilt requires us to examine the purpose of the government in calling a codefendant. As Judge Posner has observed,

> [I]t would be an abuse of [Rule 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in

> the hope that the jury would miss the subtle distinction between impeachment and substantive evidence or, if it didn't miss it, would ignore it.

United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984). Thus, we have said that "a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir. 1984).[3] In evaluating the reason a witness is called, we adopt the rule of the Fifth Circuit that the prosecution may not introduce evidence "under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) (quoting *United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982)) (emphasis original).

Peterman contends that the government called Lundquist for the sole purpose of impeaching him with

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[3] Every circuit has said evidence that is inadmissible for substantive purposes may not be purposely introduced under the pretense of impeachment. *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 1629 (1987); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986); *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986) (en banc); *United States v. Sebetich*, 776 F.2d 412, 429 (3d Cir. 1985); *United States v. Hogan*, 763 F.2d 697, 701-03 (5th Cir. 1985); *Webster*, 734 F.2d at 1192; *United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *United States v. Fay*, 668 F.2d 375, 379 (8th Cir. 1981); *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980); *United States v. Morlang*, 531 F.2d 183, 189-90 (4th Cir. 1975); *United States v. Dye*, 508 F.2d 1226, 1234 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975).

evidence of his prior conviction. The decisive issue for us is what the government expected Lundquist to say.[4] In the hearing on his motion for mistrial, Peterman offered an affidavit from Lundquist asserting that the government knew Lundquist intended to maintain his innocence, just as he had testified in the 1981 trial. The government, however, advances two explanations for why it expected Lundquist to testify differently than he had in 1981. First, the government suggests that it thought that Lundquist would admit that he had engaged in the activities for which he had been convicted because the jury had not believed Lundquist's testimony at trial. Were this the only basis for the government's belief that Lundquist would change his testimony, the government's argument would fail. A defendant cannot be expected to freely admit guilt simply because he or she has been convicted. In this case, however, the government had a second, legitimate reason for expecting Lundquist to testify differently than he had in 1981. The prosecutor and a USDA special agent indicated that they had met with Lundquist before trial and expected that Lundquist would modify his original testimony and admit that he had engaged in the activities alleged in the indictment. Lundquist, however, insisted that he had informed the government that he would not change his story. Faced

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[4] Peterman denies that Lundquist's testimony could have added anything to the government's case that had not already been obtained from other witnesses. In essence, Peterman is disputing what Lundquist would have said. If Lundquist had testified as the government expected him to testify, such evidence would certainly have added to the government's case.

with these conflicting accounts, the district court found the prosecutor and the USDA agent credible and found Lundquist not credible. In its order denying Peterman's motion for a mistrial, the court found as follows:

> [T]he Court has had opportunity to view and consider Mr. Lundquist's demeanor and manner while on the witness stand and finds that Mark Lundquist is not a believable or a credible witness. When faced with conflicting testimony on the matter, the Court is persuaded to believe the statements of Mr. Pico and Mr. Ackerman. The Court believes the plaintiff was surprised by the testimony of Mr. Lundquist. Therefore, there was no prosecutorial misconduct, and his impeachment by proof of his convictions was proper.

The court also found that defense counsel had met with Lundquist the night before the government called him as a witness and had "in some way influenced him." This supports the government's contention that it was surprised by Lundquist's testimony.

Evaluating the credibility of witnesses is uniquely within the expertise of the trial court. Based on the factual findings by the trial court regarding the relative credibility of the witnesses, we cannot say the court erred in determining that the prosecutor did not call Lundquist with the primary purpose of introducing evidence of his prior conviction.

B.

Peterman also objected to the evidence of Lundquist's prior conviction as unduly prejudicial and thus inadmissible pursuant to Fed. R. Evid. 403. The district court has broad discretion in determining whether the probative value of evidence is substantially outweighed

by its prejudicial impact. *United States v. Chalan*, 812 F.2d 1302, 1308 (10th Cir. 1987)

The danger of unfair prejudice arising from evidence of the prior conviction of a codefendant is obvious: a jury may be tempted to conclude that if one defendant is guilty of committing an offense, the other defendant is guilty as well. "A guilty plea entered by a codefendant can be especially prejudicial if the plea is made in connection with a conspiracy to which the remaining defendants are charged." *United States v. DeLucca*, 630 F.2d 294, 298 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981); *see also United States v. Christian*, 786 F.2d 203, 214 (6th Cir. 1986). The district court here, however, was careful to restrict the prosecutor's impeachment of Lundquist to minimize the danger of prejudice. Indeed, the court screened the questions that the prosecutor asked Lundquist to assure they contained no references to Peterman. Having carefully reviewed the record on this issue, we conclude that the district court did not abuse its discretion in denying the objection to evidence of Lundquist's prior conviction as unfairly prejudicial.

C.

Peterman argues that the court erred in not instructing the jury that evidence of Lundquist's prior convictions could be used only to impeach Lundquist's credibility and not as substantive evidence of Peterman's guilt. The government asserts that the court did give a proper cautionary instruction, but the cited instruction related to the effect of a prior conviction on the credibility of a witness rather than the permissible narrow use of

evidence of a prior conviction. We have said that "cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are critical." *Baez*, 703 F.2d at 455. Peterman, however, did not request a cautionary instruction for this purpose. Thus, we will reverse on this basis only if there was plain error affecting Peterman's substantial rights. *See* Fed. R. Crim. P. 52(b). This court has had several occasions recently to decide whether the failure to give a cautionary instruction regarding the use of a codefendant's prior conviction is plain error. In *Baez*, we held that the district court's reference to the guilty pleas of two codefendants amounted to plain error because of the failure to give a limiting instruction, and, "[e]ven more serious[ly]," because one of the codefendants never testified at trial. 703 F.2d at 455. Further, "[t]he only significant Government witness" against the defendant "was an informer . . . who had regularly used drugs for thirteen years." *Id.* at 456. In *Davis*, we held there was no plain error because of the appellant's effective use of his codefendants' guilty pleas and because of the "significant evidence of appellant's guilt." 766 F.2d at 1455-57. In *United States v. Austin*, 786 F.2d 986, 992 (10th Cir. 1986), we held there was plain error because "the significant evidence against [the appellants] had been supplied by coconspirators who had been given or were to receive favorable treatment from the Government in return for their testimony." In *United States v. Smith*, 806 F.2d 971, 974-75 (10th Cir. 1986), we again stressed that the government's case came from coconspirators who had pleaded guilty, and we considered the prosecutor's arguments, to the effect that "birds of a feather flock together," in concluding there was plain error.

Our review of the record in light of these decisions convinces us that the failure to give a cautionary instruction in this case was not plain error. Lundquist was only one of many witnesses who testified about Peterman's activities with Meat Masters. Here, unlike *Smith* and *Austin*, very little of the evidence against the defendant came from the contested witness. Twenty-eight witnesses testified for the government, including thirteen consumers and an undercover USDA agent who had purchased meat from Meat Masters, and another former associate of Peterman who had been a codefendant in the 1981 trial. It is also significant that the reference to Lundquist's prior conviction was isolated and not repeated by the prosecutor at any other point of the trial. In view of all of these circumstances, we hold there was no plain error.

III.

Peterman alleges that the prosecutor committed reversible error by reading statements made by Peterman in his first trial in an effort to impeach Peterman's testimony in this trial. He objects to two lines of questioning that the prosecutor pursued in cross examination at the first trial: first, the prosecutor in the 1981 trial asked Peterman about his involvement in the meat industry prior to the events specified in the indictment, and second, the prosecutor asked Peterman some questions about his family. According to Peterman, both inquiries were improper cross-examination, and the use of testimony from the first trial in the second trial constitutes reversible error. Even assuming that the cross-examination in the first trial was improper, the alleged error in no way affected the trial we are now reviewing. The brief sections of Peterman's 1981 testimony that the prosecutor

relied upon in this trial related only to Peterman's activities with Meat Masters. The prosecutor did not use any of the challenged testimony from the 1981 trial questions concerning Peterman's involvement in the meat industry before the formation of Meat Masters and questions concerning Peterman's family during the retrial. The jury never heard any of the alleged improper testimony from the first trial. We therefore conclude there is no basis for asserting any error in the prosecutor's cross examination of Peterman in this trial.

IV.

Peterman challenges the enhancement of his sentence after the second trial. He contends that the trial court relied on inaccurate information in the presentencing report and that he was deprived of a reasonable opportunity to refute the alleged misinformation. He also cites as error the court's failure to make findings of fact regarding the disputed facts in the presentence report. As explained below, we remand for resentencing so that the court may make findings.

We have held that "[w]ith few limitations, a court has almost unlimited discretion in determining what information it will hear and rely on in imposing sentence." *United States v. Graves*, 785 F.2d 870, 872 (10th Cir. 1986). Indeed, the Supreme Court has indicated that, contrary to Peterman's contention, a presentence report "may rest on hearsay." *Gregg v. United States*, 394 U.S. 489, 492 (1969). However, the court's very broad discretion in the sentencing process is limited by two separate requirements that are implicated in this case.

The first requirement stems from the enhancement of Peterman's sentence on retrial. A trial judge may impose a greater sentence on retrial than he had originally imposed, "in the light of events subsequent to the [defendant's] first trial." *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969). However, when a defendant's original sentence is increased upon reconviction in a new trial by the same sentencer, the record must affirmatively reflect the sentencer's reasons for enhancement. *Id.* at 726; *Texas v. McCullough*, 106 S. Ct. 976, 980 (1986). The requirement of a record that articulates reasons for a higher sentence protects a defendant by alleviating the fear of a vindictive reprisal by a trial judge after a successful appeal of the defendant's first conviction. *Id.* at 979. This requirement is satisfied here. The record reveals that the court's reason for imposing a higher sentence was its belief that Peterman had engaged in criminal conduct subsequent to his first conviction. Furthermore, Peterman makes no claim of vindictiveness, nor do we find anything in the record suggesting that the court's decision was based on improper motives. The requirement of *Pearce* is therefore satisfied. *See McCollough*, 106 S. Ct. at 979 (citing the holding in *Moon v. Maryland*, 398 U.S. 319 (1970), that "*Pearce* did not appply when the defendant conceded and it was clear that vindictiveness had played no part in the enlarged sentence.").

The second requirement implicated here is that there be a record which is adequate to allow the reviewing court to determine whether the sentencer relied on accurate information. Fed. R. Crim. P. 32(c)(3)(D) provides:

> If the comments of the defendant and his counsel or testimony or other information introduced by

> them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

The Seventh Circuit explained the need for a record of the determination of factual disputes:

> For example, if the court finds that information in the report is unreliable or simply decides not to rely on the disputed facts in sentencing, by following Rule 32(c)(3)(D) that decision will become part of the presentence report. This reduces the likelihood of later decisions being made on the basis of improper information. Moreover, if the record does not clearly reflect whether or not the information was relied on, appellate courts or prison officials may make incorrect assumptions about the disposition of alleged inaccuracies. Thus a court that fails to follow Rule 32(c)(3)(D) may not necessarily violate a defendant's right to due process; nonetheless, a violation of the rule could require a remand for resentencing.

United States v. Eschweiler, 782 F.2d 1385, 1387-88 (7th Cir. 1986) (citations omitted).

Because of the lack of findings by the court, we are unable to determine whether the court relied on unreliable information. Nor are we able to determine whether the court abused its discretion in failing to hold an evidentiary hearing. We therefore follow the procedure used by the court in *United States v. Petitto*, 767 F.2d 607, 611 (9th Cir. 1985), and remand for resentencing. *See also*

United States v. Golightly, 811 F.2d 1366 (10th Cir. 1987); *United States v. Bradley*, 812 F.2d 774, 781-82 (2d Cir.), *cert. denied*, 56 U.S.L.W. 3245 (U.S. Oct. 5, 1987); *United States v. Manni*, 810 F.2d 80, 82-84 (6th Cir. 1987); *United States v. Edwards*, 800 F.2d 878, 880-84 (9th Cir. 1986); *Eschweiler*, 782 F.2d at 1390-91; *United States v. Velasquez*, 748 F.2d 972, 973-75 (5th Cir. 1984).

At the sentencing hearing in this case, Peterman objected to several facts presented in the original presentence report as well as the updated report reflecting Peterman's activities between his first and second trials. The transcript of proceedings shows the court did not make findings as to each disputed contention upon which it relied. Specifically, Peterman argued the presentence report was inaccurate when it implied Peterman engaged in bait and switch tactics in stores in New Mexico, Arizona, and in two other stores in Utah. Peterman's objections called the court's attention to the specific and separate instances of wrongdoing in the report and precisely spelled out the Peterman version of each allegation. The trial court's only reference to the disputed facts is the following:

> [T]he real problem that I've got is that I gave you two years last time and you went out and did it again and it didn't seem to deter you in any way. . . . It is the finding of this court that there are grounds on which the sentence can be enhanced . . . .

The district court did not make the findings or determination required by Rule 32. The presentence report contained allegations that after defendant's 1981 conviction, he was involved in four other bulk meat bait and switch operations in Layton and Salt Lake City, Utah;

Flagstaff, Arizona; and Farmington, New Mexico. Peterman takes issue with each of these allegations. The trial court should have made a specific finding regarding each of the four allegations or should have made a determination that it would not rely on them. It then should have attached to the presentence report a written record of those findings or determinations. This is not an onerous burden. As the Advisory Committee to Rule 32(c)(3)(D) pointed out, "[the Rule] does not even require the preparation of a transcript. As is now the practice in some courts, these findings and determinations can be simply entered onto a form which is then appended to the [presentence] report." Notes of Advisory Committee on Rules, *reprinted in* 18 U.S.C.A. following Rule 32 (West Supp. 1985). Alternatively, if a transcript is prepared, a copy may be attached to satisfy the requirement of a written record. *Poor Thunder v. United States*, 810 F.2d 817, 826 (8th Cir. 1987).

On remand, the district court should provide a written record of its finding as to any of the four allegations disputed by Peterman and upon which it relies and attach this record to the presentence report.

At least two circuits have indicated that the scope of a remand in cases like the present differs depending upon the disposition of the factual discrepancies. The Seventh and Second Circuits have said that they will not require resentencing when the record is clear that the trial judge did not rely upon the contested facts but instead will remand solely to require the district court to perform the ministerial duty of attaching a written record to the presentence report. *Eschweiler*, 782 F.2d at 1390-91; *Bradley*, 812 F.2d at 782.

The record here clearly reflects that the trial court relied on at least one of the presentence report's allegations of Peterman's interim misconduct. Because it did not make a specific finding as to each of the disputed allegations or determine that it would not rely on them, resentencing is required in this case.

Because there will be another sentencing proceeding, we deem it appropriate to address Peterman's contention that the court is required to hold an evidentiary hearing to resolve the factual discrepancies. Rule 32(c)(3)(A) provides:

> At a reasonable time before imposing sentence, the court shall permit the defendant and his counsel to read the report of the presentence investigation . . . . The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

The clear language of this rule provides that a defendant must be given an opportunity to "comment on the report" but that the decision of whether to hold an evidentiary hearing is within the discretion of the trial court. Peterman suggests that given our holding in *United States v. Jones*, 640 F.2d 284 (10th Cir. 1981), effective rebuttal necessarily requires a hearing. In *Jones* we held that there is "a due process right to be sentenced only on information which is accurate." *Id.* at 286. However, in *United States v. Shepherd*, 739 F.2d 510, 515 (10th Cir. 1984), we explained that "*Jones* stands for the proposition that a defendant has the right to rebut or explain allegations made in a sentencing proceeding, not that the government must prove the allegations beyond a reasonable

doubt." It is clear that "[d]ue process does not mandate an evidentiary hearing." *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983).

During Peterman's sentencing hearing, both Peterman and his counsel were given opportunity to comment at length on the presentence report. Peterman was also allowed to file several affidavits and items of evidence. "[D]uring the resentencing procedure the court may decide whether any additional opportunity to respond is required, and by what means." *Petitto*, 767 F.2d at 611. While Peterman must be given an opportunity to explain why he believes the presentence report was incorrect, the scope of the procedure for rebuttal lies within the sound discretion of the trial judge in "balancing the need for reliability with the need to permit consideration of all pertinent information." *Papajohn*, 701 F.2d at 763 (quoting *Orner v. United States*, 578 F.2d 1276, 1279 (8th Cir. 1978)).

AFFIRMED IN PART AND REMANDED IN PART.

MAY TERM – June 7, 1988

Before Honorable Stephanie K. Seymour, Honorable Stephen R. Reinhardt* and Honorable Deanell R. Tacha, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs LARRY PETERMAN, Defendant-Appellant.	)	No. 85-1993

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER,
Clerk

*of the Uhited [sic] States Court of Appeals for the Ninth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-390 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

LARRY PETERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in allowing the government to impeach the testimony of a witness with his prior conviction.

2. Whether the district court improperly relied on unsworn representations of the prosecutor in allowing the government to impeach its witness.

3. Whether the district court prevented defense counsel from making an adequate record of his dealings with a government witness.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 841 F.2d 1474.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1988. A petition for rehearing was denied on June 7, 1988 (Pet. App. 22). The petition for a writ of certiorari was filed on August 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted on one

count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371, and eight counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner was sentenced to three years' imprisonment, five years' probation, and a $2400 fine. The court of appeals affirmed petitioner's conviction, but remanded for resentencing (Pet. App. 1-21).[1]

1. The evidence at trial showed that petitioner was the mastermind of a fraudulent scheme that relied on "bait and switch" tactics to defraud consumers. Petitioner was the founder and owner of "Meat Masters," a chain of retail stores that sold sides of beef and other large quantities of meat. Meat Masters stores were located in Utah and Wyoming. The stores advertised their products on Salt Lake City and Cheyenne television stations and in print media throughout the area, representing that meat could be purchased for prices ranging from $.97 to $1.29 per pound. Consumers were invited to call a toll-free telephone number to arrange for appointments at one of the Meat Masters stores. Pet. App. 2, 6.

Upon arrival at the store, the consumer typically would be asked if he had ever before bought meat in bulk quantities. Most consumers admitted they had not. The sales representative would then show the consumer the meat available at the advertised sale prices. That meat was fatty and discolored (Pet. App. 6). The sales representative would then show the consumer other cuts of beef that were much more attractive (*ibid.*). That meat, however, was priced at $2.39 to $2.87 per pound. The representative would then try to convince the consumer that the more expensive meat actually was a "better buy" because that meat

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[1] The court of appeals ordered petitioner to be resentenced because the district court failed to make adequate factual findings on disputed issues in the presentence report that may have influenced the sentencing decision (Pet. App. 14-21).

contained less waste than the cheaper meat on sale. One customer who sought to purchase the sale meat in spite of its appearance was told he could not have it, and other customers were told that advertised bonus meats were unavailable (*id.* at 7). Many customers bought the more expensive meat after listening to the sales pitch. *Id.* at 6-7.

2. At trial, the government called Mark Lundquist as a witness in its case-in-chief (Pet. App. 7-8). Lundquist was one of eight co-defendants who had been indicted along with petitioner, and he had initially stood trial with petitioner in 1981. Both petitioner and Lundquist were convicted, but petitioner's conviction was reversed on appeal. See *United States* v. *Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc). Lundquist did not appeal his conviction. Pet. App. 2, 7.

Lundquist testified about his relationship with petitioner. He explained that he had signed a franchise agreement with petitioner to operate a Meat Masters store in Wyoming. Lundquist recounted that even though he was nominally running a franchise, he reported on a daily basis to petitioner's Utah office. Lundquist also testified that petitioner controlled all of the receipts from the Wyoming store. 2 Tr. 219-227. During the course of his direct examination, however, Lundquist denied that he had participated in a scheme to defraud (2 Tr. 231-232). Over defense counsel's objection (2 Tr. 232-244), the government impeached Lundquist with his prior convictions for conspiracy and wire fraud stemming from his participation in Meat Masters' activities (2 Tr. 245).

Petitioner moved for a mistrial, claiming that the government had called Lundquist as a witness for the impermissible purpose of introducing evidence of Lundquist's prior conviction under the guise of impeaching him. In support of that motion, petitioner submitted an affidavit from Lundquist in which Lundquist

asserted that the government knew he would deny any wrongdoing, as he had done at the first trial. The prosecutor represented to the district court, however, that he and the case agent had interviewed Lundquist in preparation for the second trial and were led to believe that Lundquist would admit that he had engaged in the activities alleged in the indictment. 4 Tr. 355-358; Pet. App. 10. The district court discredited Lundquist's affidavit, finding that he was "not a believable or a credible witness" (Pet. App. 11). The court accepted the government's statements, finding that the prosecutor had been "surprised" by Lundquist's testimony (*ibid.*). The court concluded therefore that Lundquist had been properly impeached. Accordingly, the court denied petitioner's motion for a mistrial.

3. On appeal, the court of appeals rejected petitioner's contention that the government had called Lundquist for the sole purpose of impeaching him with prejudicial evidence of his prior conviction. The court explained that under Fed. R. Evid. 607, the government may properly impeach its own witness's testimony (Pet. App. 8), but it cannot introduce evidence "under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible" (*id.* at 9 (citations omitted; emphasis in original)). The court of appeals observed that the "decisive issue for us is what the government expected Lundquist to say" (*id.* at 10). The court noted that the district court had heard from the prosecutor and petitioner and that the conflicting accounts of Lundquist and the government created a question of credibility "uniquely within the expertise of the trial court" (*id.* at 11). The court of appeals therefore accepted the district court's finding that the government "did

not call Lundquist with the primary purpose of introducing evidence of his prior conviction" (*ibid.*).[2]

ARGUMENT

1. Petitioner renews his claim (Pet. 6-8) that the prosecutor was improperly permitted to introduce Lundquist's prior conviction for impeachment purposes. In particular, petitioner objects to the court's holding that calling Lundquist as a witness and impeaching him with his prior conviction was proper as long as Lundquist was not called for the primary purpose of placing before the jury the evidence of Lundquist's prior conviction. Using a "primary purpose" or "good faith" test, petitioner claims, would "encourage[ ] the calling of a co-defendant if there is any hope of receiving favorable testimony because the failure to receive such may be an even greater benefit" (Pet. 8).

Petitioner's concerns are unfounded. The government should be free to call an obviously knowledgeable witness such as Lundquist as long as the prosecutor is not calling the witness "as a subterfuge to get before the jury evidence not otherwise otherwise admissible." *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) (footnote omitted). If the witness is called for a legitimate purpose, the prosecutor should be permitted to impeach the witness

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[2] The court of appeals rejected petitioner's contention that evidence of Lundquist's prior conviction should have been excluded under Fed. R. Evid. 609(a). The court of appeals found that the district court had restricted the government's impeachment of Lundquist to minimize any danger of prejudice and thus had not abused its discretion in allowing the government to impeach Lundquist (Pet. App. 11-12). The court of appeals also held that the district court did not commit plain error in failing, sua sponte, to give a limiting instruction as to the permissible evidentiary use of Lundquist's conviction (*id.* at 12-14).

if the need arises. Rule 607 of the Federal Rules of Evidence, which permits a party to impeach his own witness, provides important protection against the risk that the witness will not give the testimony the prosecutor expects, or that the witness will give some testimony that is helpful to the prosecution but other testimony that is helpful to the defense. See *United States* v. *Webster,* 734 F.2d 1191, 1193 (7th Cir. 1984). In deciding whether to call the witness, the prosecutor must weigh the benefits against the risks, and in assessing the risks, it is perfectly legitimate for the prosecutor to take into account the prospect that if the witness gives damaging testimony, the government can blunt the effect of that testimony by impeaching him.[3] As long as the prosecutor's principal aim in calling the witness is to elicit relevant evidence, there is nothing improper about the prosecutor's intending to impeach the witness to undercut the harmful effect of any testimony that may be damaging to the government's case.

It is for that reason that the court in this case, like other courts of appeals,[4] scrutinized the prosecutor's reasons for

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[3] It is also legitimate for the prosecutor to bring out impeachment material during the witness's direct examination in order to blunt the effect of defense impeachment or cross-examination. See *United States* v. *Oxman,* 740 F.2d 1298, 1302-1303 (3d Cir. 1984), vacated and remanded on other grounds, 473 U.S. 922 (1985).

[4] *E.g., United States* v. *Frappier,* 807 F.2d 257, 259 (1st Cir. 1986), cert. denied, No. 86-6358 (Apr. 6, 1987); *United States* v. *Johnson,* 802 F.2d 1459, 1466 (D.C. Cir. 1986); *United States* v. *Sebetich,* 776 F.2d 412, 428-429 (3d Cir. 1985), cert. denied, No. 87-5859 (Jan. 11, 1988); *United States* v. *Hogan,* 763 F.2d 697, 701-703 (5th Cir. 1985); *United States* v. *Webster,* 734 F.2d 1191, 1192-1193 (7th Cir. 1984); *United States* v. *Crouch,* 731 F.2d 621, 624 (9th Cir. 1984), cert. denied, 469 U.S. 1405 (1985); see generally 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 607[01] (1988).

calling a hostile witness who was then impeached with otherwise inadmissible evidence. By holding that the prosecutor's primary purpose must be to obtain useful evidence from the witness, and not simply to use the witness as a vehicle for introducing inadmissible evidence, the courts ensure that the prosecutor will not abuse the impeachment rule. At the same time, however, the "primary purpose" or "good faith" rule recognizes that a prosecutor may validly intend to impeach the witness for the proper purpose of calling into question the credibility of any damaging testimony the witness may give.

Other courts of appeals have uniformly adopted a "primary purpose" or "good faith" test in ruling on the legitimacy of a party's impeachment of its own witness. See, *e.g.*, *United States* v. *Johnson,* 802 F.2d 1459, 1466 (D.C. Cir. 1986) (inappropriate for prosecution to call hostile witness "not for any testimony he could be expected to give, but for the sole purpose of bringing about the admission of a post-arrest statement that, as the prosecution well knew or should have known, was not independently admissible" (footnote omitted)); *United States* v. *Hogan,* 763 F.2d 697, 701-703 (5th Cir. 1985) (conviction reversed where government called hostile witness for primary purpose of impeaching him with otherwise inadmissible evidence); *United States* v. *Webster,* 734 F.2d at 1193 (adopting "good faith" test); *United States* v. *De Lillo,* 620 F.2d 939, 946 (2d Cir. 1980) (witness not called by the government "as a subterfuge with the prima y aim of getting to the jury a statement impeaching him"). Contrary to petitioner's assertion, the standard applied by the courts of appeals affords substantial protection against the government's abuse of its ability to impeach a witness in order to present otherwise inadmissible evidence to the jury.

Apart from the willingness of courts to inquire into the true purposes for which impeachable witnesses are called,

the Federal Rules of Evidence provide additional protection against the misuse of the right to impeach a party's own witnesses. First, the testimony of such witnesses must satisfy the threshold relevancy requirement under Rule 402. Second, Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice * * * " (Fed. R. Evid. 403). In each case where the government seeks to impeach its witness with otherwise inadmissible evidence, the government must respond to a timely objection by showing the probative value of the expected impeachment testimony. If the danger of unfair prejudice outweighs that probative value, the testimony will not be admitted. See, *e.g., United States* v. *Webster,* 734 F.2d at 1192-1193; see also Fed. R. Evid. 609(a) (evidence of prior felony conviction may be excluded where "the court determines that the probative value of admitting this evidence [does not] outweigh[ ] its prejudicial effect to the defendant").[5] Finally, the defendant can minimize the possibility of prejudice from impeachment by requesting a limiting instruction under Rule 105.[6]

The record in this case shows that the government did not call Lundquist to the stand as a subterfuge for intro-

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[5] In this case, both the district court (2 Tr. 236-240) and the court of appeals (Pet. App. 10-12) correctly rejected petitioner's argument under Rule 609(a), because Lundquist gave probative testimony regarding petitioner's control over Meat Masters stores (see 2 Tr. 220-230). In addition, the district court carefully circumscribed the government's impeachment of Lundquist (see 2 Tr. 239-243; Pet. App. 10-12).

[6] Here, petitioner did not request any limiting instruction. The court of appeals concluded (Pet. App. 12-14) that in light of the substantial evidence of petitioner's involvement in the fraudulent scheme the district court's failure to instruct the jury on its own did not amount to plain error.

ducing his prior conviction into evidence. Lundquist provided valuable testimony as to petitioner's control over the Meat Masters operation. Despite signing an agreement to operate his own franchise, Lundquist testified that he sent all his receipts to petitioner and that he reported to petitioner's Utah office on a daily basis (2 Tr. 223-227). Lundquist's testimony supported the government's contention that petitioner was the mastermind of the conspiracy and was directly involved in the operation of the fraudulent scheme charged in the indictment. In addition, as both the district court and the court of appeals found (Pet. App. 11), the prosecutor and the case agent interviewed Lundquist before the second trial and were led to believe that he would testify to his participation in the crimes charged. Petitioner's claim (Pet. 8) that the government called Lundquist simply in order to parade his conviction before the jury is therefore meritless.

2. Petitioner also contends (Pet. 8-11) that in sanctioning the prosecutor's impeachment of Lundquist, the district court improperly relied on unsworn representations of the prosecutor, while refusing to credit the contrary assertions in the sworn affidavit submitted by Lundquist. Petitioner did not raise that argument before either the district court or the court of appeals, and he has therefore not preserved the issue for review. *E.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970). In fact, when the trial judge stated that he would accept the prosecutor's in-court representations in lieu of a sworn affidavit, petitioner made no complaint that the prosecutor should be required to provide an affidavit explaining his decision to call Lundquist, and he did not suggest that the prosecutor's unsworn representations should be entitled to less weight because they were not made as formal testimony or in affidavit form. 4 Tr. 357-358. In any event, courts

routinely rely on representations of counsel in making evidentiary rulings during trial, without requiring that those representations be reduced to affidavit form. For example, counsel may be called on to represent that he or she has a good faith factual basis for asking a particular question on cross-examination. Similarly, in making evidentiary rulings, courts often must rely on attorneys' proffers of the testimony they expect to elicit. Absent unusual circumstances, the court is entitled to rely on the representations of counsel in such cases; the court need not require that counsel be sworn and forced to take the stand. In this case, likewise, the court could legitimately rely on the prosecutor's representations concerning Lundquist's expected testimony, at least where petitioner's counsel did not object to the court's acceptance of the government's proffer in that form.

3. Finally, petitioner contends (Pet. 12-13) that the district court prevented him from making an adequate record of his dealings with Lundquist. Again, petitioner did not raise that claim before either the district court or the court of appeals, and he has therefore not preserved the issue for review. Moreover, the record shows the claim is meritless. During argument on petitioner's objection to the government's impeachment of Lundquist, petitioner's counsel stated that he and Lundquist had discussed the case the previous evening. The district court responded that Lundquist's cooperation with petitioner appeared to support the government's contention that Lundquist was a hostile witness. 2 Tr. 235-236. Although argument on petitioner's objection continued for some time after the court's comment (see 2 Tr. 236-244), petitioner's counsel chose not to apprise the court of further details of his meeting with Lundquist. The court heard argument on petitioner's motion for a mistrial two days later, at which time petitioner's counsel and government counsel set forth their

legal arguments and the factual representations on which they based those arguments (4 Tr. 352-358). The court did not finally resolve the mistrial motion until several days later. At any point during that time counsel could have supplemented his remarks concerning his meeting with Lundquist, but he did not do so. Thus, petitioner's counsel had ample opportunity to make what he considered to be an adequate record on the mistrial issue. The district court did not hamper petitioner's ability to present any evidence that would have been relevant to petitioner's motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1988

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